reiterate our belief that the only action truly consistent with the spirit of Section 202(h) would be total repeal.[43]

II. THE DUAL NETWORK RULE SHOULD BE REPEALED.

Pursuant to the direction of Congress in the Telecom Act, the Commission in 1996 liberalized to some extent its dual network rule. The rule as it now stands permits a single entity to operate multiple broadcast networks unless such networks are comprised of: (i) two or more of the four major networks in existence on the date the Telecom Act was adopted (i.e., ABC, CBS, NBC and Fox) (the "major networks"), or (ii) any one of those four networks and an "emerging network" that, as of the statute's enactment, provided four or more hours of English language programming per week to stations reaching 75 percent of television households pursuant to network affiliation agreements (identified by the Commission as being WB and UPN).[44]

Pursuant to Congress's mandate to review biennially the ownership rules adopted under the Telecom Act for their continued public interest justification, CBS urges repeal of the dual network rule in its entirety on the ground that it constitutes yet another unnecessary restraint on the ability of broadcasters to achieve ownership efficiencies which would enhance their ability to

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[43] Should the Commission -- in the face of its clear prior pronouncements that a national television ownership rule is unnecessary -- nonetheless decide to retain the current 35 percent audience reach cap, it should at least not make the rule *more* restrictive than at present by eliminating the UHF discount. Whatever the extent to which the UHF handicap has been ameliorated during recent years by cable carriage and better television receivers, such a step would be fundamentally at odds with the clear intent of the Commission -- and the Congress in enacting the 1996 Telecom Act -- that the rule should be liberalized.

[44] 47 CFR § 73.658(g)(2).

compete with their multichannel rivals. Antitrust enforcement under the Clayton Act would be entirely sufficient to identify any anticompetitive concerns that might arise in the context of particular business arrangements in a less regulated marketplace environment.

A. The Threatened Economic Health of Existing Broadcast Networks Justifies Repeal of The Dual Network Rule.

From the 1979-80 television season, when ABC, CBS, and NBC still enjoyed a combined national audience share of more than 90 percent,[45] the share of the three traditional networks had dropped to 47 percent by the 1997-98 season.[46] When viewing to the Fox Network during that season is included, the total four network share was 59 percent,[47] while the combined basic and pay cable share of the television audience was 42 percent.[48]

As a result of increased competition from cable and other media, and sharply escalating program costs, broadcast networks no longer command the market share they once did nor generate the profits of an earlier day. In fact, with the exception of NBC, the current ratings leader, the over-the-air network business was the least profitable segment of the media

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[45] See, An Economic Analysis of the Prime Time Access Rule, Economists Incorporated (March 7, 1995) ("Prime Time Access Study") at 66.

[46] Nielsen Television Index, September 22, 1997 to May 20 1998. See also, "Can the Big 4 Still Make Big Bucks," Broadcasting & Cable, June 8, 1998, p. 24.

[47] Nielsen Television Index, September 22, 1997 to May 20 1998.

[48] Id.

businesses run by the parent companies of the four major networks last year, according to Broadcasting and Cable magazine.[49]

Thus, although due to a robust advertising market, operating revenues were up 13 percent for the four major networks last year in the face of continuing audience erosion,[50] three of those networks were reported to have either lost money or made only a very small profit during 1997. CBS acknowledged a $107 million operating loss on its network business, while Fox was reported to have lost $50 million.[51] As for ABC, it was reported to have earned around $75 million, after goodwill and purchase price accounting benefits were discounted, on revenues of $3,147,000[52] -- for an anemic profit margin of 2.4 percent.

The two emerging networks found themselves in even more dire economic straits. The WB Network is reported to have lost $87 million last year,[53] down from $98 million in 1996, while UPN's reported 1997 loss was more than $175 million.[54]

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[49] See, "Nets Are Big 4's Weakest Link," Broadcasting & Cable, March 2, 1998, p.4; see also "Can the Big 4 Still Make Big Bucks," Broadcasting & Cable, June 8, 1998, p. 24.

[50] See, "Nets Are Big 4's Weakest Link," Broadcasting and Cable, March 2, 1998, p. 4.

[51] Id.

[52] Id.

[53] See, "WB Tops UPN Season to Date," Broadcasting and Cable, February 23, 1998, p.41; A. J. Jacobs, "Staking a Claim," Entertainment Weekly, March 6, 1998, p. 20.

[54] Id.

Under these circumstances, there is no legal or public policy justification for denying these emerging networks, and the major networks, the ability to take advantage of economic efficiencies of common ownership that could only enhance their abilities to survive and thrive in the increasingly competitive media marketplace. Indeed, given the disparate regulatory treatment afforded to other media and non-network program distributors which provide analogous program services, it would be arbitrary and capricious to perpetuate regulations which preclude broadcast networks from even considering marketplace arrangements which could strengthen the economic underpinnings of the free, over-the-air network broadcasting business.

B. Ownership Rules Which Allow Networks to Own Cable Networks Without Restraint, While Limiting Their Ownership of Other Broadcast Networks, Make No Sense.

Under the Commission's existing rules, there is nothing to prevent the Walt Disney Company -- the corporate parent of ABC -- from owning ESPN and ESPN 2, with a combined operating cash flow for 1997 of $338.4 million.[55] Likewise, NBC is permitted to own CNBC, with a 1997 operating cash flow of $120 million.[56] Yet the dual network rule as it now stands would, for example, flatly prohibit either of these entities from acquiring the WB or UPN network, with 1997 operating losses of $87 million and $175 million, respectively. Of course, no such restraint would apply to a cable network.

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[55] Paul Kagan Associates, Wilkofsky/Gruen Associates. See Table attached as Exhibit A hereto.

[56] Id.

Thus, the dual network rule is not only a regulatory anomaly, but irrationally discriminates against broadcasting as opposed to cable, thereby imposing another handicap on free over-the-air broadcasters in their efforts effectively to compete with other media. Given the advantage cable operators and networks already have in this competition, we respectfully submit that the Commission's rules should not impose further handicaps. It is a commonplace that, while free over-the-air broadcasting must rely entirely on advertising for its revenues, cable operators and networks enjoy a dual revenue stream -- from advertising and from subscriber and license fees, respectively. In this marketplace environment, many cable networks have prospered,[57] while most broadcast networks -- most particularly UPN and WB -- have not.

Therefore, freely allowing the ownership of cable networks by broadcast networks (subject of course to antitrust oversight) -- while at the same time limiting by fiat the common ownership of broadcast networks themselves -- simply makes no sense.

C. The Diminishing Distinctions Between Over-The-Air Networking and Syndication Demonstrate That The Dual Network Rule Is An Anachronism In Its Entirety.

Since the repeal of the financial interest/syndication rule, all network companies have been permitted to operate and acquire syndication units. In view of the diminishing differences between networking and syndication, limiting the ownership of more than one broadcast network while freely allowing all network companies to own or acquire syndication operations is increasingly irrational.

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[57] See Table attached as Exhibit A hereto.

Like network programs, syndicated product is today delivered by satellite and could, depending on individual station decisions, be shown simultaneously over much of the nation. The Commission's current rules, while appropriately not restricting syndication by network companies, prohibit the combination[58] of any of the four major networks even with an emerging network that, as of the adoption of the Telecom Act, provided only "four... hours of programming per week on a national basis pursuant to network affiliation arrangements [with stations reaching 75 percent of the country.]" (Emphasis added). Every major syndicator except All American and Hearst produces at least four hours of programming per week with at least this audience reach[59] and yet remains uncovered by the rule, because it distributes its programs pursuant to syndication rather than station affiliation arrangements. Thus, most major syndicators today would easily meet the Commission's definition of an emerging network, but for the fact that their agreements with their customers are called program license agreements, rather than network affiliation agreements.[60] Therefore, prohibiting the merger of a major and emerging network -- while allowing each type of network to own syndication operations -- is a striking example of regulatory inconsistency.

D. Competition Would Not Be Adversely Affected by Repeal of the Dual Network Rule.

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[58] In referring throughout to combination or common ownership of "networks," we are not referring to mergers of network companies, where other rules and competition policies may be implicated.

[59] National Syndication Service (NSS), September 1, 1997 to June 7, 1998. See Table attached as Exhibit B hereto.

[60] The distinction between syndication agreements and the network affiliation agreements used by WB and UPN is a fine one. Neither network pays cash compensation to its affiliates, providing commercial inventory within network programs as the principal consideration for carriage of its programming.

Of the economic markets posited by the Commission as the ones in which television broadcasters compete -- i.e., the market for "delivered video programming" (i.e., competition for viewers), the local and national advertising markets, and the program production market -- only the national advertising and program production markets are relevant to analysis of the dual network rule. As we show below, elimination of the rule would not negatively affect competition in either of these markets.

a. The National Advertising Market

In its Further Notice, the Commission tentatively defined a national market for video advertising including only advertising supplied by broadcast networks, syndicators, and cable networks.[61] The Commission's proposed national advertising market is clearly overly narrow for several reasons.

First, by defining the relevant market as including only video advertising, the Commission neglected several important non-video sources of national advertising, including radio, newspapers and direct mail, the latter accounting for 20.5 percent of all national advertising -- more than the four major broadcast networks combined, which had only a 15.4 share of the national advertising market.[62] Moreover the Commission excluded from its national video advertising market DBS advertising -- although these multichannel providers had more

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[61] Further Notice, supra, 10 FCC Rcd at 3541-42.

[62] See Joint Economic Study at 20, Table 3.

than 5 million customers nationwide as of June 1997[63] -- and, more importantly, national spot advertising carried by broadcast stations and cable systems.[64] The Commission's basis for excluding national spot -- which accounts for 11.8 percent of national advertising[65] -- from the relevant market is convincingly refuted by the Joint Economic Study, which states as follows:

> "The only rationale provided by the Commission for excluding national spot advertising from the market in which network advertising competes is invalid. The Commission's rationale is that 'spot sales of advertising to national advertisers are frequently made to allow the national advertisers to reach a more targeted geographic focus and not to reach a national audience (e.g., selling trips to the Bahamas to persons in the snow belt during January).' However, the issue is whether spot advertising would constrain the pricing of a hypothetical monopolist of advertising sold by broadcast networks, cable networks and syndicators. For spot advertising to constrain network advertising, it is sufficient that there be a significant number of advertisers using network advertising for whom spot is a close substitute. It is not necessary that spot and network advertising be a close substitute for all, or even most, users of either spot or network advertising. Thus, the fact that spot advertising is frequently used for purposes for which network advertising is not a close substitute does not imply that spot advertising is not in the market in which network advertising competes."[66]

Furthermore, evidence presented in the Joint Economic Study regarding the substitution among national advertisers of broadcast network, broadcast television spot, syndication, cable network, cable spot, radio spot, newspaper, outdoor and direct mail advertising decisively shows

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[63] Annual Assessment of Status of Competition in the Market for Delivery of Video Programming, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034, 1070-71 (1998). According to a recent NAB Study, there are currently 9.1 million subscribers to C-Band and Ku-band satellite services. Media Outlets by Market - Update, Mark R. Fratrik (July 1998).

[64] Further Notice, supra, 10 FCC Rcd at 3542.

[65] See Joint Economic Study at 20, Table 3.

[66] Joint Economic Study at 21 (footnote omitted).

that the Commission's tentative decision to include only three of these outlets in its posited national advertising market is simply wrong.[67] It is thus clear that the Commission's definition of the national advertising market is dramatically underinclusive.

When the product market is limited to include video advertising only -- but broadcast and cable national spot advertising are realistically included within that category -- levels of current concentration are at levels considered low by the DOJ/FTC Merger Guidelines.[68] And a properly defined national advertising market -- one which includes not only national video advertising but newspapers, magazines, radio, direct mail, outdoor, and yellow pages -- is remarkably unconcentrated.[69]

In sum, the national advertising market, appropriately defined, is sufficiently competitive that there is no need for a prophylactic rule preventing only certain broadcast network mergers, while other combinations of national advertising media are not subject to such per se regulation. In all such cases, individual antitrust review under the Clayton Act should prove more than sufficient to prevent any combination which might threaten the robust competition which presently characterizes this market.

b. The Program Production Market

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[67] Joint Economic Study at Appendix D.

[68] Joint Economic Study at 28-29.

[69] Id. at 28.

In an era where demand for quality first-run video programming has exploded -- from independent commercial television stations whose number has more than quadrupled since 1970,[70] from an established fourth and several emerging broadcast networks, from more than 105 national and 144 regional basic cable networks[71], and from a burgeoning DBS service[72] -- it seems anomalous to suggest that the dual network rule is necessary to protect competition in the program production market. Indeed, any such suggestion appears directly at odds with the findings of the Commission itself in eliminating its financial interest/syndication ("fin/syn") and prime time access ("PTAR") rules.

For example, in repealing the prime time access rule almost four years ago, the Commission found that "the demand side of the video programming production market shows no evidence that any single buyer or group of buyers exercises undue market power."[73] There is no reason to assume that repeal of the dual network rule would alter this conclusion. Thus, a study by Economists Incorporated cited by the Commission in its decision repealing the prime time access rule found that the video entertainment programming purchased by each of the three traditional networks in 1994 accounted for only approximately 9.4 percent of the aggregate expenditures on video programming in the United States, after taking into account distribution

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[70] Report and Order, Review of the Prime Time Access Rule, 11 FCC Rcd 546, 560 (1995) ("PTAR Report and Order"). See also Second Report and Order, Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282, 3308 (1993).

[71] Nielsen Media Research.

[72] See note 63, supra.

[73] PTAR Report and Order, supra, 11 FCC Rcd at 563.

fees associated with syndicated programming and home video.[74] Adding the 5.6 percent of all such expenditures accounted for by the Fox Network during that year would lower the per major network average to 8.4 percent. As the Commission stated in its PTAR decision, "[t]hese market shares indicate that demand for video programming is not concentrated, and that the networks clearly cannot be said to exercise market power in the video programming production market, either individually or together."[75]

Once again, therefore, it is clear that the program production market is sufficiently unconcentrated so as not to warrant a per se prohibition of any and all mergers between certain networks. As is the case with competition in the national advertising market, antitrust enforcement under the Clayton Act can safely be relied upon to prevent any possible abuse. Under these circumstances, CBS urges the Commission to proceed with a Notice of Proposed Rulemaking looking toward elimination of the dual network rule.[76]

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[74] Prime Time Access Study at 128.

[75] PTAR Report and Order, supra, 11 FCC at 564-565.

[76] Just as we do not believe that repeal of the dual network rule would adversely affect competition, we do not believe that its retention is necessary to protect diversity. CBS has extensively set forth elsewhere its views on the premises underlying the Commission's approach, historically and currently, to the matter of diversity of broadcast voices, see, Comments of CBS Inc. in MM Docket No. 91-221 (May 17, 1995) at 17-25, and will not repeat those views here. For present purposes, it is sufficient to state that the marketplace of information and ideas in the United States is so phenomenally competitive that its preservation is not dependent on any prophylactic ownership regulation, including the dual network rule. See id.

III. THE EFFECT OF CHANGES IN THE COMMISSION'S LOCAL RADIO OWNERSHIP RULES.

Both the Commission and the Congress have found that some consolidation in the ownership of radio stations would result in substantial public interest benefits in today's increasingly competitive media marketplace. In enacting the 1996 Telecom Act, Congress determined that the advantages of permitting common ownership of up to eight radio stations (no more than five of which may be in the same service) could be realized without any significant adverse impact on diversity or competition. And after repeated examination of the issue, the Commission concluded that "combined efficiencies derived from the common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations [are] presumptively beneficial and would strengthen the competitive standing of the combined stations."[77] It concluded, too, that such common ownership could "enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[78]

These predictive judgments of the Congress and the Commission are amply borne out by the experience to date with the consolidation which has taken place in the radio industry since enactment of the Telecom Act. As expected, the efficiencies made possible by greater group

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[77] Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995).

[78] Id.

ownership have enhanced the financial strength of the radio industry. Thus the Commission staff has observed that

> "[P]ublicly traded companies whose primary business is radio broadcasting are experiencing robust financial performance. ... The observed consolidation of the radio industry appears to have had positive financial consequences for these radio companies."[79]

These positive effects on the financial health of the radio industry have been accomplished without cost to either competition or diversity. As we discuss in more detail below, there are many potential substitutes for radio advertising, including broadcast and cable television, newspapers, magazines, outdoor advertising, the yellow pages and direct mail. Radio stations compete vigorously not only against each other, but against these other media, engaging in constant efforts to convince advertisers either to maintain or increase the portion of their advertising budgets allocated to radio -- efforts which are in turn countered by sales pitches from competitive media directed at accomplishing the opposite result. Moreover, numerous examples exist of advertisers shifting expenditures between radio and competitive media based on cost and other considerations. The result is that radio companies -- including those owning the maximum permissible number of stations in a given market -- are significantly constrained from raising prices because of fierce inter-media competition, as well as by vigorous competition from their radio station rivals. This *intra*-media competition is reflected by the volatility in audience shares which is characteristic of the radio industry -- accounted for in part by the ease with which radio

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[79] Review of the Radio Industry, 1997, Mass Media Bureau, Policy and Rules Division (March 13, 1998) at Executive Summary. ("Staff Radio Industry Study").

stations can change their formats -- and the corresponding constant flux in shares of radio advertising revenues.

As for program diversity, an FCC staff report prepared in connection with this proceeding has found that there has been no downward trend in the number of distinct radio formats available to listeners since the consolidation in ownership which has taken place since the enactment of the 1996 Telecom Act.[80] This has also been true of the number of formats offered by the top group owner across all radio Metro markets.[81] The average number of formats per station for the top owner in each market is .8, which would indicate that eight formats are offered for every ten stations[82] -- a figure which refutes any notion that group owners have pursued, or are likely to pursue, a strategy of format domination in order to maximize profits. Rather, this finding bears out the common-sense conclusion that media companies owning a number of different radio stations in a community will seek to maximize their audience reach by programming those stations so as to appeal to as many different segments of the public as possible.

In sum, we believe that the consolidation in the radio industry which has taken place since the liberalization of the local radio ownership rules has produced significant efficiencies and cost savings which will ultimately benefit the public, without any significant detriments. We now turn to a more detailed discussion of these issues.

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[80] Staff Radio Industry Study, supra, at 11.

[81] Id.

[82] Id.

A. Consolidation in the Radio Industry Poses No Threat to Competition in Advertising Markets.

Competition in the advertising markets in which radio stations today compete is such that even powerful radio group owners face substantial constraints on their behavior. As indicated above, in deciding whether to purchase a particular radio station or group of stations in order to reach their intended audience, advertisers have a wide variety of choices: other radio stations, broadcast and cable television, newspapers, magazines, outdoor advertising, yellow pages and direct mail.[83] Advertisers decide how much of their advertising budgets to allocate to these competing media based on their perceptions of the cost and effectiveness of various media options. Notably, this is a competition in which radio has traditionally **not** made a strong showing. According to a McCann-Erickson, Inc. study cited in a recent analysis of advertising markets conducted for the National Association of Broadcasters by Capital Economics, radio accounts for seven percent of total media advertising revenues, whereas broadcast television accounts for over 20 percent and newspapers control 23 percent.[84] Given radio's relatively insignificant share of all advertising expenditures, the consolidation

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[83] Indeed, the FCC staff report prepared in connection with this inquiry specifically disclaims any conclusion that the competitiveness of advertising markets has been adversely affected by consolidation in the radio industry. As the report states:

> "Advertisers wishing to reach a local 'market' might use radio advertising, or they may use television advertising, or newspaper advertising or billboards, or any of a number of other alternatives. Consequently, changes in the concentration of the radio industry at the local level may or may not reflect increased concentration in the local adverting market."

Staff Radio Industry Study at 4.

[84] Comments of the National Association of Broadcasters on the Advertising Product Market, Capital Economics (May 15, 1996) ("Capital Economics Study") at 3.

occasioned by recent revisions in the local radio ownership limits should not give rise to competitive concerns. And if any demonstration were necessary that radio stations fiercely compete against these other media -- as well as against themselves -- for advertising dollars, it is compellingly provided by the actual behavior of both buyers and sellers in the advertising marketplace.

1. Radio and Other Media Actively Compete Against Each Other for Advertising Budgets.

While each advertising medium has unique characteristics, more than one medium can ordinarily meet the needs of a particular advertiser. Knowing this, sellers of advertising actively promote the advantages of their medium relative to the possible alternatives, in a constant effort to capture at least a share of an advertiser's spending on other media. For example, the primary mission of the Radio Advertising Bureau ("RAB"), a nationwide trade organization, is to assist its members in their efforts to divert advertising expenditures from other media to radio, while averting the shift of advertising dollars to radio's competitors. As part of this effort, the RAB provides to its members information concerning the cost and effectiveness of radio as compared to other media, as well as materials to be used in presentations to clients emphasizing the advantages of using radio as opposed to other advertising outlets.

To assist radio stations in their efforts to target newspapers as a prime source of additional revenues, for instance, the RAB has published a Competitive Handbook which contains information such as:

- The troubles advertisers face in the newspaper industry, most notably, declining circulation;

- Attributes of newspaper advertising, including the ability to communicate detailed information and the ease in tracking response through coupons;

- A countervailing list of "cautions," including low recall of advertising by newspaper readers and a lack of efficient targeting;

- Strategies for selling radio as a cost-effective part of a media mix; and

- Newspaper advertising and statistics on the audience reach of radio versus newspaper.[85]

RAB also provides materials to radio stations designed to help them sell effectively against broadcast and cable television, the yellow pages and direct mail.[86] Likewise, trade organizations representing other media also assist their members' efforts to garner a larger share of the advertising dollars devoted to their competitors, including radio.[87]

As noted in the Capital Economics Study cited above,

> "The very fact that the radio industry sponsors an organization like RAB and devotes significant resources to competing against other media indicates the intensity of this intermedia competition. In a very practical way, these materials reflect the industry's view of market reality: intense competition in a mass media market, necessitating that radio stations be equipped to demonstrate to advertisers the reasons for switching to radio -- or not substituting with another media for radio advertising."[88]

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[85] Id. at 6-7

[86] See, Radio Advertising Bureau, <u>Media Facts, The Complete Guide to Maximizing Your Advertising.</u>

[87] <u>Capital Economics Study</u>, <u>supra</u>, at 14.

[88] Id. at 13.

The fact that the industry's view of fierce inter-media competition in the advertising market is founded in reality is clearly demonstrated by the frequency with which advertisers switch all or part of their advertising budgets from one medium to another.

2. Advertisers Regularly Shift Advertising Dollars Between Media.

Advertisers make choices to allocate particular portions of their advertising budgets to various media based on the cost and perceived effectiveness of the available alternatives. They regularly shift dollars between media based, among other things, on their particular advertising strategies, shifts in the audience shares of competing media, and changes in price. This constant inter-media competition acts as a constraint on the ability of all advertising outlets, including radio stations, to raise prices, for fear of sacrificing market share.

Examples of advertisers changing to different media -- even where they have traditionally relied heavily on one outlet -- are numerous. Among the cases cited in the Capital Economics Study are the following:

- CVS, a major drug store chain, discontinued all of its radio advertising in several markets, including Boston, Philadelphia, and Washington, D.C., and shifted much of this advertising money to television, after radio stations declined to comply with its request for audience guarantees similar to those used in television.[89]

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[89] See, "CVS Demands Make Goods on Radio." ADWEEK (New England Edition), March 18, 1996.

- Dominick's Finer Foods, a major Chicago supermarket chain which had primarily relied on newspaper advertising and to some extent television, shifted virtually its entire advertising budget out of these media to radio and direct mail advertising. Dominick's found radio and direct mail to be attractive alternatives to newspapers and television because of their targeting capabilities and cost efficiency.[90]

- When Pittsburgh's two major daily newspapers stopped printing for several months due to a strike, advertisers reacted by shifting to radio, television and direct mail. After the strike ended, newspapers were forced to cut their pre-strike advertising rates in order to regain their former market share.[91]

- King Soopers, Denver's largest supermarket chain, eliminated television from its advertising budget and redirected the available funds to radio, based on the cost efficiency and effectiveness of that medium. The advertising manager of King Soopers was quoted as saying that "television advertising is just too overwrought, too overcrowded. An advertiser really has to pour in a lot of money to stand out."

- Conversely, Pepsi recently made a substantial shift of advertising dollars out of radio and into television as a result of an increase in the relative cost of radio advertising versus television.

- A clothing retailer in Philadelphia recent switched all of its advertising money our of television and into radio because, according to the agency executive responsible for the decision, "TV was too expensive and we felt we could get better results with this campaign on radio. Radio is much more targeted."

- In 1990, Sears decided to redirect part of its substantial radio budget to broadcast and cable television. Sears indicated that it was not cutting back on its advertising budget, but simply changing its media mix.

- In a contrary move also in 1990, several major national advertisers, including Xerox, Anheuser-Busch, Burger King and Volkswagen increased their use of radio because of higher television prices. Volkswagen's Director of Marketing was quoted in Advertising Age as saying that "the high cost of TV time" was the cause of this action.

- A large national advertiser indicated that regional purchases are based on a "media grid" designed to show the relative prices of various media when it negotiates the buys for time in cooperation with its local distributors. The

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[90] Capital Economics Study, supra, at 16, citing Declaration of Daniel E. Josephs, former President and Chief Operating Officer, Dominick's Finer Foods.

[91] Barr, "Any Port in a Storm," ADWEEK, September 28, 1992.

allocation of cooperative advertising budgets is based on a number of factors, including price, the promotional needs of the local distributor, and the strategies of competitors.

- Peter Shubin of Goodyear Tire Centers in Fresno, California, indicated that, because newspaper costs had gone up three to one as compared to radio, newspapers had lost their position as the advertiser's dominant medium to radio.[92]

Although the Department of Justice has more recently taken the position that radio advertising -- and even perhaps particular radio formats -- constitute a unique adverting market,[93] the DOJ has in the past regarded newspapers and radio as strong competitors, stating that "[e]ven those advertisers who find their present needs are well satisfied by one media or the other have the ability to shift media if comparative costs are altered."[94] The above examples of advertisers quickly moving from one medium to another as a result of cost and other factors strongly suggests that the Department's original view was correct.

To reiterate, the practical effect of the robust inter-media competition described above is that radio stations (as well as other media) are constrained from raising prices disproportionately to those of their competitors. Messages delivered by radio can also be effectively conveyed by a host of other media, and even some of the special advantages of radio advertising -- such as the discrete audience targeting offered by particular radio formats -- can be at least approximated by

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[92] Capital Economics Study, supra, at 17-18.

[93] Address by Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, February 19, 1997 (http://www.usdoj.gov/atr/speeches/jik 97219.htm.)

[94] Comments of the United States Department of Justice, Amendment of Sections 73.35, 73.240 and 73.636 Relating to Multiple Ownership of Broadcast Stations, FCC Docket No. 18110 (filed May 18, 1971) at 22.

cable television and direct mail. In sum, it is clear beyond question that radio today competes in an extraordinarily broad advertising market, and that the competitive effects of changes in the local radio ownership limits can only be properly evaluated in this context.

3. Radio Stations Also Engage in Intense Intra-Industry Competition, as Demonstrated by the High Degree of Volatility in Audience and Revenue Shares.

Even with the consolidation that has taken place in the radio industry as a result of liberalization of the local radio ownership rules, radio broadcasters -- including large group owners -- will continue to face an intensely competitive environment. In addition to the inter-media competition in which radio broadcasters must engage to increase or retain market share, radio stations continually vie among themselves for audience and revenues. The sharp fluctuations in audience ratings, and therefore revenue shares, which have historically characterized the radio industry show yet again that there is little need for concern that increased group ownership will have any negative effect on competition in advertising markets.

One of the reasons for the volatility in radio audience and revenue shares is the ease with which radio stations can change formats. Such format changes can be accomplished with little expense, and effectuated virtually overnight. And they have the potential of catapulting a traditional ratings and revenue laggard into a position of market leadership with almost dizzying speed.

A recent example in New York well illustrates this kind of market volatility. In the Fall of 1995, WYNY-FM was a country music station with a 1.9 audience share, making it one of the lowest-radio stations in the city. In early 1996, the station changed its format to Dance, and its call letters to WKTU. Within months, the station skyrocketed to first place in the ratings, with a 6.8 share in the summer of 1996.[95] Measured on a cumulative audience basis -- meaning the number of different people listening to the station each week -- WKTU more than tripled its audience reach, growing from 777,100 to 2,553,900.[96] This example is not an isolated phenomenon. The following schedule, which examines the changes in shares of the major demographic groups in a sampling of major markets, demonstrates that, from year to year, audience shares change in the range of 20 percent.

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[95] Arbitron Radio Market Report, New York, Fall 1995-Fall 1996, 6am-Midnight. All persons 12+, average quarter hour share.

[96] Id. All persons 12+, cumulative audience.

WEIGHTED AVERAGE ABSOLUTE PERCENTAGE CHANGE IN RADIO STATION SHARES SPRING 1995 - SPRING 1996[97]

Metro Area	All Persons 12+	All Persons 25-54	Men 25-54	Women 25-54	Teens
Boston	15.5%	19.6%	21.9%	24.4%	25.2%
Chicago	12.4%	16.8%	19.9%	19.1%	21.6%
Dallas	17.0%	23.0%	28.0%	25.2%	46.2%
Detroit	17.3%	21.7%	23.1%	24.8%	30.1%
Los Angeles	17.6%	19.6%	21.4%	22.6%	21.4%
New York	21.0%	23.2%	22.3%	29.0%	38.6%
Philadelphia	13.5%	14.2%	18.0%	17.0%	24.5%

As would be expected, such wide fluctuations in audience share produce considerable swings in revenues and revenue shares. The following table sets forth the average percentage change in a station's share of home market radio advertising revenues for the periods 1993 to 1994 and 1994 to 1995:

[97] Arbitron Rating Survey, Spring 1995-Spring 1996.

AVERAGE PERCENTAGE CHANGE IN SHARE[98]

Market	Change 1993-94(%)	Change 1994-95(%)
Boston	15.7	20.1
Chicago	12.1	12.5
Dallas-Ft. Worth	16.7	14.1
Detroit	14.9	22.2
Los Angeles	12.7	15
New York	8.1	12.8
Philadelphia	9.6	10.6

Similar results were noted in the Capital Economics Study. That study traces the audience shares of the highest rated stations in a representative group of six Arbitron markets (all in the top 100) in 1980, 1985, 1990 and 1994. The collective share of the top five stations was close to 40 percent in 1980 (average across the six markets). By 1994, however, these same groups had an average share of only 25.1 percent.[99]

The impermanence of ratings and revenue leadership in the radio industry indicates the vulnerability of even large group owners to competition from innovative rivals. Significantly, it

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[98] Source: BIA Master Access Radio Analyzer, November 96. The change in each station's share of total home market radio advertising revenue was calculated for two time periods: from 1993 to 1994 and from 1994 to 1995. That change in share was then expressed as a percentage of the station's average revenue share for the two years involved. In calculating the average change, all changes were expressed in absolute values. Hence, a movement from a 4 share to a 6 share counts the same as a movement from a 6 share to a 4 share. In both cases, there is a change of 2 on a base of 5 (the average of 4 and 6) for a percentage change of 40%.

[99] Capital Economics Study, supra, at 21.

also calls into question the usefulness of historical audience and revenue share data for assessing concentration within radio markets.[100] In light of the demonstrated ability and willingness of stations to change formats to challenge their more successful competitors, and the fact of sharp fluctuations in listener preferences, successful radio broadcasters have historically had trouble maintaining their market positions over time. There is no reason to believe that the larger radio groups being formed as a result of the 1996 Telecom Act will lead to a lessening of the intense competition between radio stations which has long prevailed in the industry.

[100] Thus, for example, the FCC staff's study of the radio industry conducted in connection with the instant proceeding shows HHIs for November 1997 exceeding 1800 for all radio Metro Markets based on existing station revenue shares. Staff Radio Industry Study at 8. However, a 1997 study commissioned by CBS from Economists Incorporated which assumed that all radio stations in a given market having reportable revenues had equal capacity to garner revenues, yielded significantly different results. See, Television-Radio Cross Ownership, Concentration and Voices in the Top 50 DMAs, Economists Incorporated (February 7, 1997) ("Local Market Study"), submitted with Comments of CBS Inc. in MM Docket 91-221 (February 7, 1997). Thus, the Local Market Study found that, after all possible mergers between television and radio stations permitted by the Telecommunications Act had occurred (assuming repeal of the television-radio cross-ownership rule), in most of the top 50 DMAs resulting HHIs were likely to be under 1,800, the lowest concentration level at which, as a practical matter, the antitrust agencies indicate any interest. In only six DMAs did the HHI exceed 2,000, and in no case did it reach 2,350. Local Market Study at Table 1. Given the demonstrated volatility in radio station revenues, where programming changes cause wide swings in the ability of stations to attract audience and therefore advertising, capacity is arguably a better measure of concentration than existing revenue share.